Supreme Court, U.S.
FILED
FEB - 8 1996
CLERK

No. 95-1083

In The

Supreme Court of the United States

October Term, 1995

CARL DAUGHERTY,

Petitioner,

vs.

THE CITY OF EL PASO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF RESPONDENT CITY OF EL PASO IN OPPOSITION

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QUESTIONS PRESENTED

Respondent believes that the petitioner has mischaracterized the opinion of the Court of Appeals in framing his questions for review. The queries outlined below more accurately summarize the controversies at issue.

1. Does the Americans with Disabilities Act (ADA) require an employer, in reasonably accommodating an individual with disability, to give that individual job preference or priority over those who are not disabled?

2. Is an insulin-dependent diabetic not an "otherwise qualified individual with a disability," as defined by the ADA, because his medical condition presents an unacceptable risk of harm?

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STATEMENT OF THE CASE

Petitioner's summary of the case and his argument contain several errors, and the following statement correctly sets forth the facts on appeal.

In June, 1992, Daugherty was diagnosed as an insulin-dependent diabetic, almost nine months after he was hired as a coach operator (bus driver) for the City of El Paso. His medical condition was serious, but did not affect his ability to perform major life activities, such as completing manual tasks, walking, seeing, hearing, speaking, and learning.

At the time of his diagnosis, Daugherty was a part-time permanent employee, and the City relieved him and placed him on a leave of absence without pay pursuant to the Department of Transportation regulations.

Following his removal, and complying with its own charter, the City sought reassignment for Daugherty in another part-time permanent position for which he was eligible. In addition, the City provided employment counseling to Daugherty, a monthly stipend, tuition for retraining, and advised him of the method by which he could move within City employment. Indeed, the City offered several jobs which Daugherty either rejected outright or applied for, but was deemed unqualified.

During the period that Daugherty was on leave of absence, the City, at Daugherty's request, attempted to accommodate him by finding a position of equal rank, pay and seniority, but to do so, the City would have violated its own regulations, subjected itself to possible

liability, and deprived a full-time employee of that position. Beyond such accommodation, the City also attempted to place him in a position within the parameters of Civil Service Commission provisions for which he qualified.

SUMMARY OF THE ARGUMENT

It is debatable whether the petitioner is "disabled" and, therefore, can invoke relief under the Americans with Disabilities Act (ADA or Act). Assuming, however, that insulin-dependent diabetes is a disability, it is clear that, with such condition, a commercial bus driver cannot perform the essential function of his job. Under the existing statutory and common-law guidelines, the efforts made by the respondent to "reasonably accommodate" the petitioner were adequate, and no employer is required to create a new job or to fundamentally alter its employment practices under the Act. Finally, there exists no compulsion for an employer to extend a brand of affirmative action to disabled employees, essentially giving them priority or preference over non-disabled workers.

ARGUMENT AND AUTHORITIES

Under the ADA, an employer discriminates against his employees by "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the employer can show that such accommodation would

impose "an undue hardship. . . . " 42 U.S.C. § 12112(b)(5)(A). The Act further defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities. . . . " and a "qualified individual," as an "individual with a disability who, with or without reasonable accommodation, can perform the essential function of the employment position. . . . " 42 U.S.C. §§ 12102(2)(A), 12111(8). Finally, "reasonable accommodation" is defined as "job restructuring, part-time or modified work schedules, reassignment to a vacant position . . . [or] modifications of policy. . . . " 42 U.S.C. § 12111(9)(B).

Insulin-dependent Diabetes is Not a Disability

Although the Court of Appeals decided to skirt the issue of whether insulin dependency is a disability, as contemplated by the Act, it is a logical place to start. No circuit court has ever expressly held that insulin-dependent diabetes is a disability, and a recent examination of the issue reaffirms the ADA definitions. *Coghlan v. H.J. Heinz Co.*, 851 F.Supp. 808, 813 (N.D. Tex. 1994). In *Coghlan*, the court, in reviewing the tangled history of the debate, held that, in order to establish the disability, a plaintiff must show evidence that his impairment "substantially limits" a major life activity. *Coghlan*, 852 F.Supp. at 813; 42 U.S.C. § 12102(2)(A).

This substantial limitation of the petitioner's lifestyle was never presented or proved below.

Otherwise Qualified Disabled Person

As analogous guidance, the Rehabilitation Act of 1973 defines the term "handicap" in essentially the same language as the ADA defines "disability," and, assuming that a disability truly exists, our courts, in analyzing the former statute, have provided a two-step inquiry into the qualification: can the disabled or handicapped employee perform the "essential functions" of the job and, if not, can "reasonable accommodations" be afforded. 29 U.S.C. § 706(8)(B); *Chiari v. City of League City*, 920 F.2d 311, 315 (5th Cir. 1991).

In *Chiari*, the employee, an engineer who had been diagnosed with Parkinson's disease, experienced dizziness and stumbling on the job and was, after attempts to adjust his job to his condition, discharged. *Chiari*, 920 F.2d at 314. In affirming the trial court's judgment in favor of the defendant, the Court of Appeals held that a disabled person cannot perform the essential function of a job if he poses a "genuine substantial risk" to himself and others. *Chiari*, 920 F.2d at 317; *See, e.g. School Board of Nassau County v. Arline*, 480 U.S. 273, 287, 107 S.Ct. 1123, 1131, 94 L.Ed.2d 307 (1987). In *Chiari*, the afflicted employee's loss of balance and stumbling at work sites was found to be a dangerous condition and he, therefore, could not perform the essential function of a construction inspector. *Chiari*, 920 F.2d at 317.

In analyzing the second prong of the test, the court held that, when efforts to reassign the disabled employee or to restructure his job are proved unworkable, then no reasonable accommodation can be made. *Chiari*, 920 F.2d at 319.

In a case directly involving diabetes, an insulin-dependent employee who had experienced several hypoglycemic incidents in the past was demoted, and he brought suit under the Rehabilitation Act of 1973. *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993). A *Chiari* two-step analysis was conducted, and it was found that, indeed, an insulin-dependent diabetic "presents a genuine substantial risk that he could injure himself or others." *Chandler*, 2 F.3d at 1395; *see e.g. Serrapica v. City of New York*, 708 F.Supp. 64, 83 (S.D.N.Y. 1989); *Davis v. Meese*, 692 F.Supp. 505, 521 (E.D. Pa. 1988), aff'd 865 F.2d 592 (3d Cir. 1989).

In the second part of the analysis, the employee could not show how the "safety risk inherent in . . . driving" could be eliminated and, therefore, no reasonable accommodation was available. *Chandler*, 2 F.3d at 1395.

In the case below, there is little dispute that Daugherty, the petitioner, could not meet the stringent driving standards because of his diabetic condition and, therefore, could not perform the essential function of his job. The focus of the petitioner's argument is on the second prong of the analysis; however, he presents little or no evidence to show the absence of reasonable accommodation. In fact, the only evidence adduced on this point shows continued, good-faith efforts by the City to rehire or retrain Daugherty. As the *Chiari* court reasoned, a city "does not have to create a new job" or fundamentally alter its program to reasonably accommodate an individual. *Chiari*, 920 F.2d at 318; *also see Arline*, 480 U.S. at 289 n.19; *Alexander v. Choate*, 469 U.S. 287, 300, 105 S.Ct. 712, 719-720, 83 L.Ed. 2d 661 (1985).

Job Preference or Priority

Although presented in the petition as an issue, Daugherty cites no statutes or precedents for arguing that the ADA requires a brand of affirmative action in favor of disabled individuals over the non-disabled. Certainly, the civil rights of any individual may not be ignored, but as the Court of Appeals stated below, there is nothing in the ADA that even suggests that a disabled person should be given preference or priority over his non-disabled fellow workers. This notion is unthinkable, especially, one would imagine, to the disabled.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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